Supreme Court, U.S.
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No. 01-0126

In The

Supreme Court of the United States

TIMOTHY DANIELS AND F/V MISS JENNA, LLC,

Petitioners,

v.

FRANCIS PATENAUDE AND THE NATIONAL MARINE FISHERIES SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT FRANCIS PATENAUDE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a limited access fishing permit, issued to a commercial fishing vessel by the National Marine Fisheries Service on a limited basis pursuant to applicable federal regulations, is an appurtenance of the vessel subject to a maritime lien.

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50 C.F.R. § 648.4(a)(1)(i)(A):

> Eligibility. To be eligible to apply for a limited access multispecies permit, as specified in § 648.82, a vessel must have been issued a limited access multispecies permit for the preceding year, be replacing a vessel that was issued a limited access multispecies permit for the preceding year, or be replacing a vessel that was issued a confirmation of permit history.

50 C.F.R. § 648.4(a)(1)(i)(C):

> Qualification restriction. Unless the Regional Administrator determines otherwise, no more than one vessel may qualify, at any one time, for a limited access permit or CPH based on that or another vessel's fishing and permit history. If more than one vessel owner claims eligibility for a limited access permit or CPH, based on one vessel's fishing and permit history, the Regional Administrator will determine who is entitled to qualify for the permit or CPH and any DAS allocation according to paragraph (a)(1)(i)(D) of this section.

50 C.F.R. § 648.4(a)(1)(i)(D):

> Change in ownership. The fishing and permit history of a vessel is presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred, unless there is a written agreement, signed by the transferor/seller and transferee/buyer, or other credible written evidence, verifying that the transferor/seller is retaining the vessel's fishing and permit history for purposes of replacing the vessel.

50 C.F.R. § 648.4(a)(1)(i)(L):

> Restriction on permit splitting. A limited access permit issued pursuant to this section may not be issued to a vessel or its replacement or remain valid, if the vessel's permit or fishing history has been used to qualify another vessel for another Federal fishery.

STATEMENT OF THE CASE

On November 17, 1998, Respondent Francis Patenaude ("Respondent") filed the underlying in rem admiralty action against the F/V MISS JENNA, seeking to enforce a maritime lien for various necessaries which he supplied the vessel over the course of several years. (App. 29, ¶ 15). Respondent simultaneously filed a motion to seize the F/V MISS JENNA, which motion was allowed by the District Court on November 19, 1998. (App. 29, ¶ 16). On November 27, 1998, the United States Marshal seized the F/V MISS JENNA in New Bedford, Massachusetts. (App. 30, ¶ 18). At the time of her seizure, the F/V MISS JENNA was owned by the Petitioner F/V MISS JENNA, LLC. (App. 29, ¶ 12). At all times relevant, Petitioner Timothy Daniels was the legally authorized agent of F/V MISS JENNA, LLC, and made all decisions regarding the handling and transfer of the F/V MISS JENNA's fishing permits, fishing history, and permit eligibility. (App. 28, ¶ 7).

At the time the F/V MISS JENNA was seized, she had posted in her wheelhouse Permit No. 410037, which conferred rights to fish for limited access scallops and summer flounder within the waters of the United States.

(App. 30, ¶ 20). Under applicable National Marine Fisheries Service ("NMFS") regulations, the F/V MISS JENNA also had a corresponding "fishing history" or "permit eligibility," which is a record of fish caught by the vessel over time, and which is generally used by NMFS to determine whether a vessel qualifies for a limited access fishing permit and what that vessel's permit will allow. (App. 25). Consistent with the practice of the lower courts and the parties, Respondent sometimes refers to the permit alone when both the permit and the corresponding permit history are meant. *See Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 65 n.1 (1st Cir. 2001).

On or about December 8, 1998, while the F/V MISS JENNA and her Permit No. 410037 remained under the custody of the U.S. Marshal, Petitioner Daniels, without notice to the Court and without informing NMFS that the F/V MISS JENNA was in custodia legis, applied to NMFS to transfer the F/V MISS JENNA's fishing history and permit eligibility – essentially, the right to apply for a new limited access permit – to a different vessel under his ownership or control, the F/V TOP FLIGHT. (App. 30, ¶ 21). Approximately two months later, in response to the Respondent's written inquiry as to the location and status of the F/V MISS JENNA's limited access fishing permit, Petitioner stated that to his knowledge, the limited access fishing permit was still on board the vessel. (App. 32, ¶¶ 29, 30).[1]

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[1] It is true that Permit No. 410037 was at all times on display in the wheelhouse of the F/V MISS JENNA. However, Petitioners violated federal regulations and misled creditors by allowing the physical permit to remain on display, apparently

On March 1, 1999, following Petitioners' representation that the limited access permit was still with the vessel, Respondent purchased the F/V MISS JENNA at a judicial sale. (App. 32, ¶ 31). The F/V MISS JENNA was in generally poor condition, and had little value apart from its fishing permits. (App. 14). After title to the F/V MISS JENNA was transferred to the Respondent, he applied to NMFS to use the vessel's fishing history to obtain a new limited access permit, and was for the first time advised that Petitioners had transferred the necessary fishing history and permit eligibility to the F/V TOP FLIGHT. (App. 32, ¶ 33).

Respondent subsequently successfully moved for a preliminary injunction invalidating Petitioners' transfer of the F/V MISS JENNA's fishing history and permit eligibility on the ground that that they, together with the permit, were an appurtenance of the seized vessel subject to his lien. NMFS did not object. (App. 21). Following submission of stipulated facts and oral argument, the District Court issued a final judgment on October 31, 2000, confirming its prior ruling and holding that the fishing history and associated fishing permit were appurtenances of the F/V MISS JENNA which transferred to the Respondent when he bought the vessel at judicial sale. (App. 4-5). The Court did not issue a formal opinion. The First Circuit Court of Appeals summarily affirmed

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"issued" to the F/V MISS JENNA, after having used the F/V MISS JENNA's permit or fishing history to qualify the F/V TOP FLIGHT. *See* 50 C.F.R. § 648.4(a)(1)(i)(L).

the District Court's decision on April 20, 2001, relying on its recent decision in *Gowen*.[2]

REASONS FOR DENYING THE WRIT

I. There is no conflict between circuit courts of appeal and/or state courts of last resort; there is no important question of federal law; and the First Circuit based its decision on a properly stated rule of law.

None of the Supreme Court Rule 10 criteria for granting certiorari exist. There is no conflict between the First Circuit's decision in *Gowen* and any other United States court of appeals or state court of last resort, and no court has held that fishing permits are not an appurtenance of a modern commercial fishing vessel. Because the principal purpose of granting certiorari is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law, the writ should be denied. *See Braxton v. U.S.*, 500 U.S. 344 (1991).

Nor is the question presented an especially important issue of federal law. While importance is subjective, the significance of a case should at least generally depend on how many other persons, apart from the litigants, will be affected by the questions presented. *See* Robert L. Stern, et al., *Supreme Court Practice* § 6.31(b) (6th ed. 1986). To date, only two cases (this case and *Gowen*) have directly litigated the issue of whether a vessel's fishing permit is subject to a maritime lien. In both cases, the courts

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[2] A Petition for Writ of Certiorari in the *Gowen* case is currently pending before this Honorable Court, Docket No. 01-19.

decided that it is. Two decisions from the same circuit coming to the same conclusion on a rarely litigated issue do not justify certiorari.

Clearly the better approach is to let additional lower courts address the issue presented in this case before granting certiorari. Justice Brennan once revealed that "there is already in place, and has been ever since I joined the Court [in 1956], a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983). *See also, McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., dissent from denial of certiorari addressed to "those of my Colleagues who agree with me [on merits of issue] but believe that this Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem"). Indeed, this Court recently declined to review an admiralty issue which is more common than that presented here, and which involved a clear split of authorities among the Circuits. *See Sisson v. Ruby*, 497 U.S. 358, 365 n.4 (1990) (declining to review test for determining "traditional maritime activity," despite split between Second, Fourth, Fifth, Sixth, and Seventh Circuits).

Finally, regardless of the ultimate decision in *Gowen*, there is no question that the First Circuit in that case applied a properly stated rule of law regarding what constitutes an appurtenance of a vessel. A petition for a

writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. *See* Supreme Court Rule 10. Petitioners do not challenge, nor can they, the basic rule of law as stated and relied upon by the First Circuit: "Traditionally, a maritime lien attaches not only to the bare vessel but also to equipment that is used aboard the vessel and is 'essential to the vessel's navigation, operation, or mission.' " *Gowen*, 244 F.3d at 67, *citing Gonzalez v. M/V Destiny Panama*, 102 F.Supp.2d 1352, 1356 (S.D.Fla. 2000); *United States v. F/V Sylvester F. Whalen*, 217 F.Supp. 916, 917 (D.Me. 1963). Because the First Circuit undoubtedly applied the correct legal standard, the writ should be denied.

II. The First Circuit's *Gowen* decision is correct, as is its summary affirmance of the District Court's decision in this case.

Despite Petitioners' best efforts to portray it otherwise, the First Circuit's decision in *Gowen* simply applies, in a straightforward manner, well accepted admiralty law principles and policy to a new issue arising out of a recent federal moratorium on the issuance of fishing permits for certain potentially threatened species. Far from a "rogue" decision, *Gowen* is in complete accord with long-standing admiralty rules regarding maritime liens and appurtenances. The First Circuit is not making new law, but is instead simply applying established legal doctrines to a new issue.

The First Circuit and District Court below correctly recognized that in a modern era of limited access fisheries, fishing permits fall cleanly within the well-established definition of a vessel appurtenance. "An appurtenance is commonly defined as an item that is essential to the ship's navigation, operation, or mission." *E.g., Gonzalez*, 102 F.Supp.2d at 1354, *citing Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan*, 890 F.Supp. 552, 561-62 (N.D.Miss. 1995); *Payne v. SS Tropic Breeze*, 274 F.Supp. 324, 330 (D.P.R. 1967), *rev'd on other grounds*, 412 F.2d 707 (1st Cir. 1969); *F/V Sylvester F. Whalen*, 217 F.Supp. at 917; *The Witch Queen*, 30 F.Cas. 396, 397 (D.Calif. 1874). In today's world of extensive federal regulation and limited access fisheries, it is hard to imagine what could be more necessary to a fishing vessel than its required permits and fishing history.

In the words of the District Court in this case, "there is very little that serves the purpose of a fishing vessel more than the right to fish." (App. 9). This essential point was also plainly recognized by the District Court in *Gowen*: "[T]here can be no doubt that a commercial fishing permit is as vital as the nets to the mission of a fishing vessel." *Gowen, Inc. v. F/V Quality One*, 2000 U.S. Dist. LEXIS 8587, *10 (D.Me., June 14, 2000). Indeed, in an era of limited access fisheries, "fishing permits are apparently more integral to [a fishing vessel's] future as a commercial fishing vessel than is the tangible equipment, because the permits, unlike the rest of the appurtenances, are extremely difficult to replace." *Id.*

The lower courts also correctly held that recognizing fishing permits as appurtenances of a vessel furthers the purposes of maritime liens and the appurtenance rule

generally. A basic purpose of maritime liens is to make readily available to a mobile borrower the secured credit that is often necessary to ensure that a vessel can obtain the basic supplies or services needed for its operation. *Gowen*, 244 F.3d at 68, *citing Stewart & Stevenson Servs.*, 890 F.Supp. at 562; *Bavely v. Wandstrat*, 146 B.R. 963, 971 (Bankr. S.D.Ohio 1992), *affirmed*, 153 B.R. 781 (S.D.Ohio 1993); 29 *Moore's Federal Practice* § 705.01[1], at 705-7 (3d ed. 2000). In today's regulatory environment, marine suppliers recognize that the value of a commercial fishing vessel to which they extend credit is closely tied to the value of the vessel's permits. (App. 11-15). *See also, Gowen*, 244 F.3d at 68 ("For present purposes, what matters is that vessels . . . are valuable significantly, and sometimes almost entirely, because of their permits.").

As a practical matter, holding that permits are not appurtenances could have a serious impact on those involved in commercial fishing, because marine suppliers would be more reluctant to extend much needed credit to vessels. *See Gowen*, 2000 U.S. Dist. LEXIS 8587, *11 n.6. As noted by the District Court in *Gowen*, the basic principle behind the appurtenance rule is that marine suppliers extend credit based on the entire vessel as a going concern, rather than on the hull and cabin alone. *Id., citing The Hope*, 191 F. 243, 245 (D.Mass. 1911). Generally speaking, fishermen such as Petitioner Daniels seeking repairs and supplies on credit are likely to benefit from treating a vessel's permits as appurtenances. *See Gowen*, 244 F.3d at 69-70.

That fishing rights are intangible is a difference without consequence. As correctly noted by the Court of Appeals, there is no general objection to treating an

intangible as an appurtenance and therefore subject to a maritime lien as, for example, intangible freight charges due on account of a vessel's carriage of cargo are routinely subject to maritime liens against the vessel.[3] *See Gowen*, 244 F.3d at 68, *citing United States v. Freights of the Mount Shasta*, 274 U.S. 466, 469-70 (1927). Further, although it is true that traditionally most items deemed to be appurtenances have been tangible, the appropriate legal test focuses on whether an item has value and is essential to the operation of a vessel, not on whether it is tangible or intangible property. *Stewart & Stevenson Servs.*, 890 F.Supp. at 561-62. *See also, The Joseph Warner*, 32 F.Supp. 532 (D.Mass. 1939).

III. Petitioners' "Pandora's Box" of hypothetical conflicts do not justify granting certiorari.

Ignoring the fact that fishing permits fall cleanly within the well established definition of an appurtenance, and that recognizing permits as appurtenances of the vessels they serve furthers the goals of maritime liens and the appurtenance rule generally, Petitioners instead conjure a litany of hypothetical conflicts – both procedural

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[3] Petitioners are correct that maritime liens generally attach directly to a vessel owner's intangible rights in freight charges due on account of a vessel's carriage of cargo, whereas the instant case presents the question of whether a maritime lien can indirectly reach the intangible fishing history as an "appurtenance" to the vessel. However, that is a procedural distinction without any substantive policy difference. The cases addressing freight charges teach that there is no general policy objection to maritime liens reaching intangible rights.

and conceptual – in support of granting certiorari. Hypothetical conflicts which have not yet arisen in the lower courts should not provide the basis for certiorari, but Petitioners' concerns are greatly exaggerated in any event.[4]

1. The *Gowen* decision does not violate the doctrine that maritime liens are *stricti juris*, and does not interfere with NMFS policy or regulations.

Petitioners argue that *Gowen* violates the doctrine that maritime liens are *stricti juris* and should not be extended by construction, analogy, or inference. *See Racal Survey USA, Inc. v. M/V Cont Fleet*, 231 F.3d 183 (5th Cir. 2000). The argument fails because this case does not establish any new type of maritime lien. Indeed, Respondent's claim under a maritime contract for the supply of "necessaries" to the F/V MISS JENNA is among the most traditional of maritime liens. The question presented is whether Respondent's traditional maritime lien applies to the fishing permits of the F/V MISS JENNA, as appurtenances of the vessel.

In any event, while it has been said that the courts cannot create a new lien, this Court has declared that "this does not mean that the right to the lien is not to be recognized and upheld, when within accepted supporting principles merely because the circumstances are unusual

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[4] In the words of the District Court in this case, Petitioners' hypothetical concerns "are very interesting cases for someone else." (App. 14).

or infrequent." 2 *Benedict on Admiralty* § 21 at 2-5 (7th ed. 1994), *citing Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933). Also, contrary to Petitioners' contention that admiralty law should not recognize new forms of maritime liens, it is well established that federal courts have full authority to update old doctrines and to recognize new forms of liens if warranted by new conditions. *See Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603 (1991), *on remand* 780 F.Supp. 191 (S.D.N.Y. 1991) (advances made by ship's agent may give rise to a maritime lien); *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986) (unpaid insurance premiums give rise to a maritime lien). *See also,* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 9-1 at 486 (2d ed. 1994). In a new era of strictly regulated fishing rights, federal courts are well within their power to hold that limited access permits are appurtenances of vessels subject to maritime liens.

Nor does *Gowen* interfere with NMFS policy or regulations. Importantly, NMFS was an active party to the proceedings below, and apart from asking that the District Court not take too broad a view of the rights involved, it had no objection to finding that fishing permits are appurtenances of a vessel. (App. 21). Petitioners' argument that fishing permits cannot be appurtenances because they are not considered property under applicable statutes and NMFS regulations fails because it is a long standing principle of the lien system that all appurtenances to a vessel are subject to a maritime lien,

regardless of ownership interests.[5] *See Gowen*, 2000 U.S. Dist. LEXIS 8587, *8, *citing SS Tropic Breeze v. Tropical Commerce Corp.*, 456 F.2d 137, 141 (1st Cir. 1972) (cement loading equipment appurtenant to cement carrier regardless of ownership); *F/V Sylvester F. Whalen*, 217 F.Supp. at 917 (leased fathometer and radar appurtenant to vessel despite lessor having title to equipment). Also, according to NMFS regulations, the property right in question is not the physical permit itself, which may be in the nature of a revocable right, but is rather the *eligibility to apply* for a limited access permit, based on a vessel's fishing and permit history:

> "If more than one vessel owner claims eligibility for a limited access permit or CPH, based on one vessel's fishing and permit history, the Regional Administrator will determine who is entitled to qualify for the permit . . . ." 50 C.F.R. § 648.4(a)(1)(i)(C).

Petitioners also argue that *Gowen* is inconsistent with NMFS's regulation of limited access fisheries. In fact, *Gowen* is in complete agreement with NMFS regulations instructing that fishing rights attach to vessels, not their owners. *See* 50 C.F.R. § 648.4(a)(1)(i)(A) ("To be eligible to apply for a limited access multispecies permit, as specified in § 648.82, *a vessel must have*. . . . "); 50 C.F.R. § 648.4(a)(1)(i)(C) ("Unless the Regional Administrator

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[5] Given Petitioners' attempt to transfer the rights conferred by the permit and fishing history while the F/V MISS JENNA was in custody, their aggressive litigation of this matter at the district court level, and their appeal to this Court, it is ironic that they now assert there is no property interest in the permits.

determines otherwise, no more than one *vessel may qualify*, at any one time, for a limited access permit . . . ."); 50 C.F.R. § 648.4(a)(1)(i)(D) ("The fishing and permit history of a vessel is presumed to *transfer with the vessel* whenever it is bought, sold, or otherwise transferred . . . .") (emphasis supplied).

The drafters of the regulations controlling limited access permits were clearly of the opinion that the right to fish should attach and be an appurtenance to vessels, not their owners. Their reasoning was that it is the size, type, and number of vessels which most directly affects fish stocks, not the circumstance of who owns those vessels. *See generally*, National Oceanic and Atmospheric Administration, Proposed Rule, Guidelines for Fishery Management Plans, 47 FR 27228, 27237-8 (1982 WL 137388 (F.R.)) (June 23, 1982). Because the regulators' focus was on limiting the size and number of vessels prosecuting fisheries, the right to fish at all is linked to a vessel, not its owner. The National Oceanic and Atmospheric Administration's statement of purpose is clear:

> "A moratorium is important to the effort reduction program because it enhances the predictability of the effect of effort reductions on total mortality and it reduces the impact of the effort reductions on individual participants. To insure some control on the predictability of the effort reduction program, *a finite number of units of effort, i.e., fishing vessels, is necessary.*" (emphasis supplied).

59 FR 9872, 9875 (1994 WL 58090 (F.R.)) (March 1, 1994).

Federal courts likewise recognize that vessels, not owners, are either eligible or ineligible for commercial fishing permits and other documentation under federal maritime law. *Southeast Shipyard Ass'n v. U.S.*, 979 F.2d 1541, 1544 (D.C. Cir. 1992). Fishing and other endorsements are issued to vessels, not their owners. *See id., citing* 46 U.S.C. § 12106(d)(1) ("A *vessel may be issued* a certificate of documentation with a coastwise endorsement if. . . .); § 12108(c) ("A fishery endorsement to engage in fishing . . . may be issued *to a vessel* that. . . . ") (emphasis supplied). The endorsement, if granted, goes with the vessel. *See id.*

NMFS itself has raised none of the concerns now relied upon by Petitioners. The *Gowen* decision comports with federal caselaw and NMFS regulations, and the writ should be denied.

2. Petitioners' hypothetical concerns regarding the application of the Supplemental Rules for Certain Admiralty and Maritime Claims do not justify granting certiorari

Primarily focusing on the intangible nature of a vessel's fishing history, Petitioners offer various potential problems regarding the applicability of the Supplemental Rules for Certain Admiralty and Maritime Claims to the arrest and sale of a vessel's intangible fishing privileges. Most importantly, however, none of Petitioners' hypothetical procedural concerns have yet arisen or been adjudicated in an actual case. The mere fact that lower courts may have to further tailor the application of the Supplemental Rules certainly does not justify granting certiorari,

and at a minimum, this Court should wait for an actual conflict to arise. For this reason alone, Petitioners' hypothetical procedural concerns can be wholly ignored.

Petitioners' concerns about the procedural mechanism for arresting and selling vessels along with their permits are greatly overrated in any event. The Supplemental Rules have already twice proven themselves equal to the task in this case and *Gowen*, where the litigants worked through the procedural issues without undue problems. Notably, Petitioners raised no objections about the procedures involved in the arrest and judicial sale at the trial court level.

Petitioners also posit several jurisdictionally based concerns arising out of the as yet undetermined issue of whether a vessel's fishing permit is deemed to legally reside on board the vessel or at the regional NMFS offices. All of Petitioners' hypothetical concerns rely on the significant assumption that a vessel's permits would be deemed to reside at NMFS regional offices – a position which seems especially debatable given the well established NMFS view that permits issue to vessels. If permits are in the future deemed to legally reside on vessels, Petitioners' concerns evaporate.

In a related hypothetical, Petitioners surmise that if a creditor has a maritime lien against a fishing vessel and its permit, the vessel is subsequently lost at sea, and the owner then transfers the permit to another vessel, the creditor might then assert his maritime lien against the second vessel. Petitioners argue that "it stands to reason" that the creditor's maritime lien on the fishing permit would follow to the replacement vessel, thereby giving

the creditor the right to proceed *in rem* against the new vessel, despite having no lien against the vessel itself.

The argument fails because the creditor in this situation never has a maritime lien directly against the fishing permit; rather, the creditor's maritime lien reaches the fishing permit only to the extent that it is an appurtenance of the original vessel when the vessel is seized. This being so, existing admiralty rules are sufficient to resolve the issue. If the owner takes no steps to transfer the permit away from the lost vessel, it remains a part of that vessel which may be salvaged, and thus subject to the creditor's maritime lien. *See, e.g., Walsh v. Tadlock,* 104 F.2d 131 (9th Cir. 1939) (maritime lien may hold on portion of vessel which remains or can be reached after vessel is lost); *Chapman v. Engines of the Greenpoint,* 38 F. 671 (S.D.N.Y. 1889) (liens on vessel destroyed attached to engines salvaged from the wreck). If, on the other hand, the owner transfers the permit to another vessel before the creditor seizes the res, then the permit would become an appurtenance of the second vessel outside the scope of the creditor's maritime lien, just as if the vessel owner had transferred a radar, radio, or other appurtenance prior to seizure. Maritime liens against the first vessel do not "carry over" to the second vessel on the back of a transferred appurtenance.

Petitioners' hypothetical problems regarding the applicability of the Supplemental Rules, to the extent they exist at all, are questions for another day.

3. *Gowen* promotes uniformity within the law of admiralty

Citing the need for uniformity of maritime law, Petitioners argue that the First Circuit's decision in *Gowen* creates uncertainty because permits are issued on a regional basis and are species specific. As such, Petitioners argue, the value of a particular fishing history or permit eligibility may depend on the type of fish being harvested or where the vessel is operated. The argument merely recognizes the longstanding reality that what may be necessary for one vessel's mission is not necessarily so for another's, and that the relative value of a vessel's appurtenances will always vary with circumstances. As recognized by the District Court in this case, for example, an air conditioner might not be valuable to a person fishing in Arctic waters, but it can still be an appurtenance elsewhere. Petitioners' argument is really only about what value is going to be attached to a particular appurtenance. (App. 12-13).

CONCLUSION

There is no conflict between circuit courts of appeals or state courts of last resort on the question presented. The question is of limited importance, and the Court of Appeals in *Gowen* applied correctly stated legal principles in reaching its decision. The *Gowen* decision was correctly decided, and Petitioners' hypothetical conflicts do not

justify granting certiorari. For all these reasons, the writ should be denied.

Respectfully submitted,

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